***THE HON'BLE SRI JUSTICE K.C. BHANU**

+ W.P.No.24348 of 2004

%Dated 25.01.2005

K.Sudarshan Reddy, S/o.K.Narasimha
Reddy, aged 50 years, R/o.H.No.5-11-186,
Naimnagar, Hanamkonda, Warangal
.. Petitioner

Vs.

$ The Government of A.P. rep. by the Secretary,
Roads and Buildings Department, Secretariat,
Hyderabad.
2.The Chief Engineer, Roads and Buildings, Erra Manzil
Hyderabad.
3.The Superintending Engineer (R&B), Rural Circle,
Bulkampet, Hyderabad.
4.The Commissioner, Commissionerate of Tenders, C-Block,
6th floor, B.R.K.R. Bhavan, Hyderabad.
5.M. Ramakrishna Reddy & Co., rep. by Managing Partner,
R/o.H.No.8-3-833/208, Phase II/5B, Kamalapuri Colony,
Hyderabad.
.. Respondents

<GIST

>HEAD NOTE:

! Counsel for the Petitioner: Mr. V.Venkataramana

^Counsel for the Respondents 1 to 4: G.P. for Roads and Buildings

^Counsel for the Respondent No.5: Mr.Prasada Rao Vemulapalli

? Cases referred

1. 1994(6) SCC 651
2. 2001(2) SCC 451
3. 2005(1) ALT (DB)
4. 1991(3) SCC 273
5. 2004(3) SCC 553
6. 2005(1) ALT 69

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

TUESDAY, THE TWENTY FIFTH DAY OF JANUARY
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE K.C. BHANU

WRIT PETITION NO : 24348 of 2004

Between:

K.Sudarshan Reddy, S/o.K.Narasimha Reddy
R/o.H.No.5-11-186, Naimnagar Hanamkonda, Warangal.

..... PETITIONER

AND

1 Govt. of A.P. by Secretary, Road and Buildings Department, Secretariat, Hyderabad.
2 Chief Engineer, Road and Buildings, Erra Manzil, Hyderabad.
3 Superintending Engineer (R&B) Rural Circle, Bulkampet, Hyderabad.
4 Commissioner, Commissionerate of Tenders, C-Block 6th Floor B.R.K.R. Hyderabad.
5 M.Ramakrishna Reddy and Co., rep. by Managing Partner, R/o.H.No.8-3-833/208, Phase II/5B, Kamalapuri Colony, Hyderabad.

.....RESPONDENT(S)

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a writ of Mandamus or any other appropriate writ declaring that the action of the respondents 2 to 4 in re-validating the technical bid of the 5th respondent and opening the price bid of the 5th respondent for the work of formation of approached four lane road from Hyderabad Srisailam road to the proposed international Airport at Shamshabad, after rejection of the technical bid of the 5th respondent as per the schedule of dates contained in the notice inviting tender, is arbitrary and malafide and direct the respondents 1 to 4 to consider and accept the tender of the petitioner without taking into account of the tender of the 5th respondent and award the contract to the petitioner and grant such other relief as it deems fit and proper in the circumstances of the case.

Counsel for the Petitioner: MR.V.VENKATARAMANA

Counsel for the Respondents 1 to 4: GP FOR ROADS & BUILDINGS

Counsel for the Respondent No.5: Mr. Prasada Rao Vemulapalli

The Court made the following :

ORAL ORDER:

This writ petition is filed seeking a Mandamus to declare the action of the respondents 2 to 4 in revalidating the technical bid of the 5th respondent for the work of formation of approach four lane road from Hyderabad – Srisailam road to the proposed International Airport at Shamshabad and opening the price bid after rejection of the technical bid of the 5th respondent as per the scheduled dates contained in the notice inviting tender as arbitrary and *mala fide* and consequently direct the respondents 1 to 4 to consider and accept the tender of the petitioner without taking into account of the tender of the 5th

respondent.

The brief facts that are necessary for the purpose of disposal of the writ petition may be delineated as follows:

The 3rd respondent issued Notice Inviting Tenders (hereinafter referred to as 'NIT') on 'e' Procurement Platform basis vide Tender Notification No.TS1/T4/1530/2004-05-5, dated 1.7.2004 about formation of approach four lane road from Hyderabad – Srisailam Road to the proposed International Airport at Shamshabad. As per the terms and conditions of tender notification, the estimated contract value of the subject work is Rs.6,84,94,038/- and the work has to be executed within a period of 15 months. It was a lump sum contract and on open tender basis. In response to the same, the petitioner submitted his tender along with requisite documents and E.M.D. and uploaded his tender. As per the terms and conditions of the tender notification, each bidder shall demonstrate liquid assets/or credit facilities of not less than Rs.136.99 lakhs. He submitted his tender with full details about the technical equipment and other requirements. He also disclosed in his tender vide letter dated 5.8.2004 that he has credit facilities from ING Vysya Bank, Hanamkonda to a tune of Rs.577.75 lakhs from the bankers which was uploaded along with the tender and also the same forms part of the tender documents. Therefore, he is fully eligible for consideration of award of the contract. According to him, the tenders have to be finalized at two stages namely the technical bid and the price bid. As per the notification, the date of opening of technical bid was 23.7.2004 at 3.00 p.m. and the qualified technical bids should reach the stage of opening of price bid on 26.7.2004 at 3.00 p.m. Along with the petitioner, the 5th respondent and three others filed their tenders for the same work. In respect of tender documents of the 5th respondent, on down-loading from the website, it was found that the 5th respondent has not complied with the requirements of the check list accompanying tender in Annexure-1 i.e. submission of copy of the latest income tax returns that were submitted to the Income Tax

Department along with the proof of receipt. The said instructions, according to him, are mandatory requirement, but the 5th respondent has simply enclosed his income tax PAN Card and he has not submitted the latest income tax returns or latest income tax clearance certificate. Thus, the tender of the 5th respondent requires outright rejection as per the Clause 25.13.4. of N.I.T. The petitioner has further pointed out that since he has credit facility with his banker, there is no necessity of submission of solvency certificate. As per Clause 25(5) (III) it does not arise since the said clause has given an option to the tenderer to demonstrate credit facility/solvency certificates for not less than Rs.136.99 lakhs. As he already demonstrated about his credit facility to a tune of Rs.577.75 lakhs, he did not enclose subsisting solvency certificate under the impression that the fulfilment of the condition is optional to the tenderer. Since his tender was cleared at the stage of technical bid, his price bid was opened by the office of the 3rd respondent. Except his tender, the tenders of the others including the 5th respondent were not cleared in the evaluation of the technical bid. Thus, his tender alone was processed for acceptance to the 2nd respondent and thereafter to the 4th respondent. Now, the 4th respondent is considering the petitioner's tender. At this stage, the petitioner came to know that the 4th respondent has directed the 3rd respondent to open the price bid of the 5th respondent and he does not know the reason why the 4th respondent has issued such a direction, which is in total deviation of the tender process. Out of favouritism and due to the political pressure, it appears that the 4th respondent has directed the 3rd respondent to open the price bid of the 5th respondent after about 5 months from the date of opening of the price bids as per the notification. According to him, the process of tender is a competition and a tenderer, who has failed at one stage cannot be considered after the event is over. Whatever may be the ground for rejection of the technical bid of the 5th respondent, he cannot be allowed to compete with him since his technical bid was accepted on the date of

opening of the technical bids. It is stated that equity does not have any role to play if the tenderers make any mistakes because it ensures the benefit of the other tenderers. When the 5th respondent has not enclosed the income tax clearance certificate and latest income tax returns along with the uploaded tender documents, he cannot be given any chance to rectify the same under any circumstances. That apart, his price bid was opened as per the schedule mentioned in the notification and therefore, his quoted rate become known to all concerned. Now the price bid of the 5th respondent is being opened and the 5th respondent has an advantage over him insofar as the quoted rate is concerned. At any rate, the action of the respondents in opening the price bid of the 5th respondent at this stage after the prescribed dates in the notification are over is arbitrary and vitiated by favouritism. Now the tender of the 5th respondent is being processed to the 3rd respondent and shortly it will be processed to the 4th respondent also. Since he is an aggrieved party on account of the revalidation of the tender of the 5th respondent, he is constrained to file this writ petition.

The 2nd respondent filed counter affidavit stating that the Government, vide G.O.Ms.No.1055 T (R&B) Department, dated 18.9.2003 have accorded administrative sanction for an amount of Rs.960 lakhs for formation of four lane approach road from Hyderabad – Srisailam road to International Airport at Shamshabad. Accordingly, the Chief Engineer (Roads) has accorded technical sanction for Rs.740.00 lakhs vide proceedings dated 18.5.2004. The tenders for the above work were invited by this respondent vide 'e' Procurement NIT, dated 1.7.2004 with schedule of sale opening date from 7.7.2004 to 23.7.2004 and the date for opening of the technical bid at 3.00 p.m. The E.C.V. for the above work is Rs.6,84,94,038/- and the period of completion of the work is 15 months. In response to the above CTN, the 3rd respondent received 5 tenders on 23.7.2004. The technical evaluation of the five bids has been done by the 3rd respondent, who disqualified all the 5 tenders and submitted the

same to the Chief Engineer (Roads) on 31.7.2004, who in turn submitted it to the Commissioner of Tenders (hereinafter referred to as "C.O.T") on 13.8.2004 qualifying only one tenderer i.e. the petitioner herein and requested C.O.T to examine and grant permission for opening of the price bid of eligible tenderer. The C.O.T has returned the same to the Chief Engineer with instructions to follow the tenders strictly in accordance with the tender conditions and the Government Orders in vogue. Accordingly, the 3rd respondent re-evaluated the tenders and qualified the tender of the petitioner and opened the price bid on 26.8.2004, duly taking into account the solvency certificate furnished by the petitioner for Rs.400 lakhs issued by the ING Vysys Bank which was not considered earlier and recommended the tender of the petitioner at 6.66% less for consideration. Meanwhile, the Government, vide Memo, dated 1.9.2004 has instructed the Chief Engineer to keep subject work in abeyance with immediate effect and cause enquiry into serious irregularities committed by the Superintending Engineer (R&B) Rural Circle, Hyderbad in opening the bid of only one firm without following tender conditions, even though the C.O.T has instructed to act strictly as per tender conditions. In response to the Government Memo, the Chief Engineer (Roads) has informed the Government that the processing of tenders for the above work is kept in abeyance and further requested the Government to appoint Sri A.Meeran Mohiuddin, C.E (R&B) in his letter, dated 2.9.2004. The Government appointed him as Enquiry Officer to enquire into the irregularities committed by the Superintendent Engineer with instructions to submit report to the Government. Accordingly, Meeran Mohjuddin submitted a report on 21.9.2004. The Enquiry Officer submitted a report stating that the disqualification of the 5th respondent appears to be misinterpretation of the qualification criteria for opening of price bids. The tender accepting authority detects any error in the evaluation of tenders by Superintending Engineer and may direct the Superintending Engineer/Civil Engineer to re-evaluate the tenders. The Commissioner of Tenders, in his meeting held on 22.12.2004 and the members have discussed thoroughly the issue and opined

that the 5th respondent has furnished the PAN card and ITCC for 2002-03 online and I.T. returns for Assessment year 2003-2004 on 9.8.2004 which is adequate to qualify for opening the price bid and hence, the tender proposals may be returned to the Chief Engineer with a direction to open the price bid of the 5th respondent. The decision of the C.O.T was communicated vide its letter, dated 23.12.2004. As per G.O.Ms.No.94, dated 1.7.2003, in case of any discrepancy or non-adherence to the conditions, the same shall be communicated which will be binding both on the tender concluding authority and the Contractor. In case of any ambiguity, the decision taken by the C.O.T on tender shall be final. The qualification criteria in respect of the 5th respondent has been thoroughly discussed by the members of Committee comprising of (1) Commissioner, Comissionerate of Tenders, (2) Chief Engineer (R&B), (3) Chief Engineer, Medium Irrigation, (4) Director of Works Accounts and (5) Chief Engineer (R&B) N.H. in the C.O.T meeting held on 22.12.2004 and the decision is communicated to the Chief Engineer (R&B) . Therefore, according to the 2nd respondent, the qualification criteria for opening of price bid under clause 3.3 of the tender conditions is very clear and the 5th respondent has satisfied all the conditions as enumerated in clause 3.3. The qualification data is different from the qualification criteria for opening of the price bid. It is also very clear that in the notification, the conditions laid down under qualification criteria for opening of the price bid cannot be relaxed. At the first instance, the petitioner has not submitted the required solvency certificate as per the tender conditions and he made a representation on 5.8.2004 to the Superintending Engineer. Though the 5th respondent submitted the PAN number as per the Circular, dated 13.2.2004 issued by the Ministry of Finance, Government of India, he made a representation to the 3rd respondent on 9.8.2004 along with a copy of income tax returns for the relevant period. While both the petitioner and the 5th respondents were on equal footing, the 3rd respondent qualified only the petitioner and disqualified the 5th

respondent. In view of the fact that the petitioner cannot complain anything about the 5th respondent, because both were on equal footing, the 3rd respondent should have qualified both the petitioner and the 5th respondent and should have opened the price bids. As per the circular orders of the Ministry of Finance and Company Affairs, dated 10.2.2004 and 13.2.2004 respectively, the Contractors shall not be required to get I.T. clearance certificate from the I.T. department, as there is no need to furnish such certificate while submitting the tenders to Government departments. However, all such persons shall quote their PAN in their tender or other relevant document. It is further stated that the price bid of the petitioner was not opened as per the scheduled date. The allegation of the petitioner that due to favouritism and political pressure, the 4th respondent directed the 3rd respondent to open the price bid is utterly false and there is no basis for such allegations. The law is well settled in these matters and principle of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. The right to refuse the lowest or any other tender is always available with the Government. Unless the Court is satisfied that there is a substantial amount of interest or the transaction entered into is *mala fide,* the Court should not intervene under Article 226 of Constitution of India in disputes between two rival tenderers. Hence, the 2nd respondent prays to dismiss the writ petition.

The 5th respondent filed counter affidavit stating that the contention of the petitioner that he is fully qualified needs to be decided by the competent authority. He admitted that the technical bids were opened on 23.7.2004 on schedule. The price bids of the qualified tenders were not opened on 26.7.2004 at 3.00 P.M. Meanwhile, this respondent noticed that it did not submit the Income Tax returns, although it submitted the PAN as per Circular No.2/2004 issued by the Ministry of Finance, Government of India, and it made a

representation to the 3rd Respondent on 9.8.2004 along with the copies of the Income Tax Returns for the relevant period and to consider its tender. At this stage, it is pertinent to note that the petitioner also did not submit the requisite solvency certificate as per the tender conditions and he made representation to the 3rd respondent on 5.8.2004. Therefore, he fulfilled the requirement on 5.8.2004. The petitioner cannot blame either this respondent or the 3rd respondent for considering its tender. This respondent and the petitioner made representation to the 3rd respondent subsequent to the opening of technical bids about the inadvertence/non-compliance of the Tender stipulation and complied on 9.8.2004 and 5.8.2004 respectively. This respondent quoted 13.6%, 7% less than the petitioner by stating that the State would be benefited to the extent of about Rs.43.00 lakhs by awarding the contract to this respondent. The criteria for opening the price bid are provided in Clause 3.3 of N.I.T. According to the said provision, this respondent is qualified for opening its price bid. Accordingly the 3rd respondent had opened price bid of this respondent after this respondent complied with the tender stipulations and no motives can be attributed to or *mala fides* imputed to the said action. The petitioner is mixing up the eligibility criteria for opening of the price bid with that of submission of tenders. The qualification criteria for opening of the price bids are given in Clause 3.3 and the instructions provided at Clause 16 are only directory and not mandatory for opening of the price bids. Even otherwise in terms of Clause 22, which is in paragraph E (Tender Opening and Evaluation), the 3rd respondent can always seek clarification with regard to the statements, documentary proof, etc. of technical bid. Both the petitioner and this respondent without waiting for the said action of the 3rd respondent made their respective representations along with the documents and accordingly the official respondents are taking action to proceed with the tendering process. As a matter of fact, this writ petition is premature inasmuch as no decision is yet taken to award the contract to this respondent. No *mala fides* have been attributed to the respondents 1 to 4 with cogent

reasons. The direction given by the 4th respondent directing the 3rd respondent to open the price bid of the 5th respondent is not in the knowledge of this respondent. The petitioner's contention that due to political pressure, this respondent is being considered at the cost of the petitioner is denied. Both the petitioner and this respondent were only contractors qualified for consideration. As both are qualified, it is for the authorities to decide on the advantages either economical or operational and the petitioner cannot seek a mandamus to eliminate the competitors. The failure to submit I.T. returns along with tender documents would not *ipso facto* disqualify a tender being rejected from considering further. Hence, the 5th respondent prays to dismiss the writ petition.

Heard the learned counsel for both the parties and perused the material on record.

The learned counsel for the petitioner has contended that the tender of the 5th respondent has been rejected in technical bid for non-submission of income tax return and therefore, his tender cannot be revalidated for the purpose of opening of the price bid whereas, the 5th respondent is fully eligible to the tender conditions and he is entitled to the contract; that invalid tender cannot be revalidated; that the Enquiry Officer, who is appointed is not an authority to give a report to revaluate the tenders; that the tender conditions have to be scrupulously followed and that the revalidation of the technical bid of the 5th respondent is totally arbitrary and therefore, he prays to allow the writ petition.

On the other hand, the Government Pleader for the respondents 1 to 4 has contended that in the first instance, in the technical evaluation of all the 5 tenders which were received for the work have been disqualified. As the Superintendent Engineer committed serious irregularities, the Commissioner of Tenders ordered enquiry by appointing Chief Engineer to enquire into the matter, which is in accordance with the tender conditions. The rejection of the tender of

the 5th respondent for not submitting income tax return is not a mandatory requirement and that the tender of the 5th respondent has already been accepted. Therefore, there are absolutely no grounds to allow the writ petition.

The learned counsel for the 5th respondent has contended that in view of the circular instructions of the Government of India, quoting of Pan number is sufficient. Filing of latest income tax return is not mandatory for opening of technical bid of the 5th respondent and therefore, the writ petition is premature inasmuch as no decision is taken by the respondents 1 to 4 to award the contract and that the petitioner also stands on the same footing in not submitting solvency certificate, but he submitted a solvency certificate on 5.8.2004 i.e. after the due date. Hence, there are no grounds to grant any relief to the petitioner.

The Government of Andhra Pradesh, Roads and Buildings Department issued a notice inviting tenders on 1.7.2004 for the work of formation of approach four lane road from Hyderabad – Srisailam to the proposed International Airport at Shamshabad in Ranga Reddy District. The estimate contract value of work is Rs.6,84,94,038/-. The said work has to be completed within a period of 15 months. It was not a lumpsum contract. The last date for submission of tenders was 23.7.2004 upto 11.00 A.M. As per the tender conditions, the date and time of opening of technical bid is 23.7.2004 at 3.00 P.M. whereas, the opening of price bid is 26.7.2004 at 3.00 P.M. In pursuance of the said tender notification, the 3rd respondent received five tenders. All the five tenders have been evaluated by the 3rd respondent and disqualified. He forwarded the same to the Chief Engineer (Roads) on 31.7.2004 who in turn sent the same to the Commissioner of Tenders on 13.8.2004 qualifying only one tenderer i.e. the petitioner. The 3rd respondent re-evaluated the tenders in pursuance of the directions of the 2nd and 4th respondents and qualified the tender of the petitioner and opened the price bid on 26.8.2004 duly taking into account the solvency certificate furnished by the petitioner for Rs.400 lakhs

issued by the ING Vysya Bank, which was not considered earlier. Meanwhile, the Government in its Memo No.9264/R.III/2/2004, dated 1.9.2004 issued instructions to the Chief Engineer to keep the subject work in abeyance with immediate effect and cause enquiry into the serious irregularities committed by the 3rd respondent in opening the bid of only one firm without following the tender conditions even though the C.O.T. has instructed to act strictly as per the conditions. In response to the Government Memo, the 2nd respondent while keeping the work in abeyance requested the Government to appoint one A.Meeran Mohiuddin, C.E. (R&B) & member of C.O.T. as Enquiry Officer. Accordingly, the Government appointed Meeran Mohiuddin, who in turn submitted a report wherein it was observed that the disqualification of the 5th respondent appears to be misinterpretation of the qualification criteria for opening of price bid.

The scope of judicial review as far as tender/contract matters are concerned, is very limited in view of the decision reported in ***TATA CELLULAR Vs. UNION OF INDIA*** wherein the following principles have been laid down:

1. *The modern trend points to judicial restraint in administrative action.*

2. *The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*

3. *The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*

4. *The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.*

5. *The Government must have freedom of contract. In other*

words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

6. *Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.*

The learned counsel for the petitioner in support of his contention, placed reliance on the decision reported in ***W.P. STATE ELECTRICITY BOARD Vs. PATEL ENGINEERING CO.*** wherein it is held to the following effect:

> *"The mistakes/errors in question, it is stated, are unintentional and occurred due to the fault of the computer termed as "a repetitive systematic computer typographical transmission failure". It is difficult to accept this contention. A mistake may be unilateral or mutual but it is always unintentional. If it is intentional it ceases to be a mistake. Here the mistakes may be unintentional but it was not beyond the control of respondents 1 to 4 to correct the same before submission of the bid. Had they been vigilant in checking the bid documents before their submission, the mistakes would have been avoided. Further, correction of such mistakes after one and a half months of opening of the bids will also be violative of clauses 24.1, 24.3 and 29.1 of the ITB."*

The learned counsel also relied upon a decision rendered by the Division Bench of this Court in ***RAMKY INFRASTRUCTURES LIMITED Vs. SRI LAXMI METAL INDUSTRIES AND CONSTRUCTIONS*** wherein their Lordships held as follows:

> *"We are of the view that the respondents are bound by the conditions and the bid conditions ought to have been complied with scrupulously; otherwise non-adherence to the instructions would encourage and provide scope for discrimination,*

arbitrariness and favouritism, which are totally opposed to rule of law. The very purpose of issuing instructions is to ensure their enforcement; lest the rule of law would be a casualty".

On the other hand, the learned counsel for the respondents relied upon a decision reported in ***PODDAR STEEL CORPN. Vs. GANESH ENGINEERING WORKS*** wherein it is observed as under:

"The requirements in a tender notice can be classified into two categories those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case, the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."

He also relied upon a decision reported in ***ABL INTERNATIONAL LTD Vs. EXPORT CREDIT GUARANTEE CORPN. OF INDIA LTD. w***herein it is observed thus:

"It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India."

It is pertinent to refer to a decision rendered by the Division Bench of this Court in the case of ***N. DOLENDRA PRASAD Vs. GOVT. OF ANDHRA PRADESH*** wherein their Lordships held to the following effect:

"The law relating to judicial review in the matter of award of a contract by the State and its Corporations and bodies acting as instrumentalities and agencies of the government is almost settled by the decisions of the Supreme Court in R.D. Shetty V. International Airport Authority, Fertiliser Corporation Makgar Union V. Union of India, Assistant Collector Central Excise V. DUNLOP India Ltd., Tata Cellular V. Union of India, Ramniklal N. Butta V. State of Maharashtra and Raunaq International Ltd., V. I.V.R. Construction Ltd. One principle, which has always been emphasized is that the State, its Corporations and agencies have the public duty to be fair to all concerned. When

some defects are found in decision making process, the Court must exercise its discretionary power under Article 226 but with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. It is also true that the Court in exercise of the power under Article 226 will not interfere in matters involving technical expertise, but, at the same time, it cannot be said that the Court has no competence to interfere where such matters are not dealt with in a transparent and fair manner or dealt with in an arbitrary and discriminatory fashion. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene."

From the above decisions, it is clear that the Courts can scrutinize the class of the contract by the Government or its agency in exercise of its power of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of the power of judicial review. In such matters, the extent of judicial review permissible has been stated in ***Tata Cellular*** case (1 supra).

At the same time, the respondents are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though the decision of the Government is not amenable to the judicial review in such matters, the Court can examine the decision making process and interfere if it is found to be vitiated by *mala fides* of unreasonableness and arbitrariness.

Now it has to be seen whether the non-submission of latest income tax return is contrary to the tender conditions and whether the respondents 1 to 4 have any authority to revalidate the tender which was rejected at the stage of technical bid.

The learned counsel for the petitioner has vehemently contended that one of the eligibility criteria for opening of technical bid is submission of latest income tax return. Now it has to be seen whether submission of such certificate is mandatory as per NIT. Clause 2 of NIT, dated 1.7.2004 shows the firms eligible to tender. The firms who

i. possess the valid registration in the class and category

mentioned in the NIT and satisfy all the conditions therein

ii. are not blacklisted or debarred or suspended by the Government for whatever the reason, prohibiting them not to continue in the contracting business.

iii. have complied with the eligibility criteria specified in the NIT are eligible tenderers.

In this case, Clause 3 is relevant because the counsel for the petitioner has placed reliance on this clause. As seen from the N.I.T, the eligibility criteria for opening the price bid have been specified. From the eligibility criteria as mentioned in this document, furnishing of income tax return is a condition precedent but this eligibility criteria are for opening the price bid but not the technical bid. There is no stipulation or criteria evolved in this tender document for opening the technical bid, but according to the instructions to the tenderer as per clause 3.1, among other things, a copy of latest income tax clearance certificate has to be accompanied by the tender document. Under Clause 15, the tenderer should invariably ensure that certain copies of documents are to be furnished in hard copy to the tender receiving authority one day before opening of the price bid besides uploading them on line. One among such documents is copy of PAN card along with proof of having a copy of latest income tax returns submitted along with proof of receipt.

Admittedly, the 5th respondent has not submitted the latest income tax return along with the tender document. Para 16.1 of the instructions to the tenderers, shows that a copy of the PAN card and copy of the latest income tax return can be submitted one day before opening of the price bid. No doubt, it also says that those things have to be uploaded on line. Only the price bids of the qualified tenderers, whose technical bids are found satisfying the eligibility criteria shall be opened in the presence of the qualified tenderers or their

authorized representatives present on the date and time fixed. Clause 22.1 also shows that the tender opening authority may call upon any tenderer for clarification of the statements and documentary proof relating to the technical bid. The request for clarification and response thereto shall be in writing and it shall be only on the qualification information furnished by the tenderer. Admittedly, in this case, the authority concerned has sought no such clarification.

As per the instructions to the tenderers, a check list has to be accompanied by the tender document. As per the check list, one of the requirements is a copy of the PAN along with proof of having a copy of a latest income tax returns submitted along with proof of receipt. Though the 5th respondent submitted the PAN card, but admittedly, he has not submitted the income tax returns of the income tax assessment year 2003-2004 at the time of submitting tender but they were submitted on 9.8.2004. The 5th respondent also furnished the PAN card and income tax clearance certificate for the year 2002-2003 on line. The 3rd respondent disqualified the tender of the 5th respondent on the basis of not furnishing the copy of latest income tax return as per Clause 16.1c of the tender document. Clause 16.1 says such of those documents can be furnished to the tender receiving authority one day before the opening of the price bid, no doubt, besides uploading them on line. In this case, the 5th respondent has furnished the PAN card and income tax certificate for 2002-2003 on line and income tax returns for the assessment year 2003-2004 on 9.8.2004.

In the N.I.T, there are no criteria evolved for opening of technical bids. The procedure for opening of technical bids has been laid down in G.O.Ms.No.94 I 7 CAD (PW – COD) dept, dated 1.7.2003. In this case also, in the eligibility criteria, G.O.Ms. No.94 has been referred to in N.I.T. In the said Government Order, clause(iv) of Para (7) reads thus:

> *"First cover (cover-A) with superscription as "TECHNICAL BID" which shall contain the qualification data as described at para*

10 will be opened".

Therefore, from the above clause, it is clear that if the technical bid of the tenderer contained qualification data prescribed in Para (10) of the Government Order, then it has to be opened. The qualification data for opening of technical bid as per para 10 read as follows:

QUALIFICATION CRITERIA

A. *To qualify for award of the Contract, each bidder in his name should have during the last five years (specified financial years i.e. they should be immediately preceding the financial year in which tenders are invited)*

b. *Satisfactorily completed as a prime contractor, similar*

works of value not less than Rs. /- @ (usually not less

than 50% of Estimated value o f contract) in any one

year.

a. *executed in any one year, the following minimum quantities of works:*

- *Cement concrete including RCC and PSC Cum.*

- *Earth work in both excavation and Embankment*

Cum

- *(relevant principal items be indicated*

- *(usually 50 percent of the expected peak quantities of*

construction per year)

B. Each Bidder should further demonstrate:

a. *Availability (either owned or leased or to be procured against mobilisation advances) of the following Key and critical equipment for this work.*

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Note: (Based on the studies carried out by the Engineer, the minimum suggested major equipment to obtain the completion of works in accordance with the prescribed construction schedule/mile stones are shown in the above list)

b. *Availability of the Key personnel with adequate experience as required should be indicated based on the requirement for the work to be executed.*

c. *Liquid assets/credit facilities of not less than Rs. Lakhs (credit lines/letter of credit/solvency certificates from Banks etc. shall be equivalent of the estimated cash flow for three months in peak construction period)*

d. *EMD in the shape of Bank Guarantee in the standard format enclosed, for Rs…… (one percent of the estimated contract value) to be valid for the period as indicated at para 1.03 (d) i.e. period of completion plus defect liability period.*

e. *Experience relating to the works executed in State/Central Government departments or State/Central Government undertakings shall only be considered.*

As seen from the above paragraph, which has to be followed in this case also for opening of the technical bid of a tenderer, the tender documents need not contain proof of copy of the latest income tax returns. Perhaps that is the reason why clause 16.1c of the tender instructions would clearly go to show that the copy of the PAN card along with the proof of copy of latest income tax returns can be submitted on any day before the opening of the price bid. From the qualification data, for opening of the technical bid of a tenderer, it need not contain copies of latest income tax return. Therefore, rejection of the tender document of the 5th respondent at the time of technical bid for not furnishing the copy of latest income tax return is totally unsustainable.

Now it has to be seen whether the tender accepting authority can revalidate the invalid tender of the 5th respondent in the technical bid.

Since the 3rd respondent committed several irregularities, the Chief Engineer (R&B) was appointed as Enquiry Officer to enquire into certain irregularities. Based on the report of the Enquiry Officer, C.O.T sent back the matters to the authorities to re-examine the tenders as per the tender conditions and also the instructions of the Government of India, which are in vogue. Thereafter, the C.O.T., in the meeting held on 23.12.2004, discussed the matter thoroughly and opined to qualify the opening of the price bid of the petitioner and directed the Chief Engineer to open the price bid of the 5th respondent. Under clause 23.2 of instructions to the tenderers, if the technical bid of a tenderer is not satisfying any of the eligibility criteria, it will be rejected by the Superintending Engineer. However, if the tender accepting authority detects any error in the evaluation of tenders by the Superintending Engineer, the tender accepting authority, while returning the tenders, may direct the Superintending Engineer or Chief Engineer as the case may be, to re-evaluate the tenders. The C.O.T., who is the accepting authority, based on the report, found an error in evaluating the tenders by the Superintendent Engineer, therefore, it directed the Chief Engineer to re-evaluate the tenders. The C.O.T is completely competent to re-evaluate the tenders by virtue of clause 23.2 of instructions to the tenders. So, the contention that the Enquiry Officer has no authority to conduct the enquiry and that an invalid tender cannot be re-evaluated is unsustainable and wholly devoid of merit.

The tender committee consists of Commissionerate of tenders, Chief Engineer (R&B), Chief Engineer, Medium Irrigation, Director of Works Accounts and the Chief Engineer (R&B) N.H. No *mala fides* have been attributed to any of the members of the committee.

In the first instance, the technical bid of the writ petitioner was also disqualified, but the Chief Engineer on scrutiny, qualified him. The ground for the rejection of the technical bid of the petitioner is that he

has not submitted the liquid assets and/or credit facilities of not less than Rs.136.99 lakhs. Admittedly, the petitioner has submitted the credit facility with his banker and as per clause 25(5) (III) the necessity of submission of solvency certificate does not arise since the said clause has given an option to the tenderer to demonstrate credit facilities/solvency certificate and the petitioner has demonstrated his credit facility with ING Vysya Bank, Hanamkonda to a tune of Rs.577.75 lakhs in his tender documents itself. He fulfilled the condition even though he did not enclose subsisting solvency certificate and perhaps that is the reason why his technical bid was revalidated and accepted subsequently.

So, from the above discussion, it is clear that the respondents acted in accordance with the procedure laid down by them in N.I.T and they have not departed from the norms, standards and procedures arbitrarily.

In view of the decisions referred to above, the terms of the invitation to the tenderers are not open to the judicial scrutiny. The same being in the realm of the contract, the Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, *mala fide* or actuated by bias. In the affidavit of the writ petitioner, no *mala fides* are attributed to any of the members of the C.O.T. It is only stated in the affidavit that out of favouritism and due to political pressure, it appears that the 4th respondent has directed the 3rd respondent to open the price bid of the 5th respondent after about five months from the date of opening of the price bid. It is further stated that at any rate the action of the respondents in opening the price bid of the 5th respondent after the prescribed dates in the notification are over is arbitrary and vitiated by favouritism. Except these two allegations there is nothing to show as to how the action of the respondents 1 to 4 is arbitrary or in what manner they have shown the favouritism to the 5th respondent or in what manner political pressure has been brought on the 4th respondent in directing the 3rd respondent to open the price bid of the 5th respondent.

From the aforesaid discussion, I am of the opinion that there is no arbitrariness on the part of the 4th respondent in directing the 3rd respondent to open the price bid of the 5th respondent, nor is there any favouritism. Factual foundation on those aspects is very much lacking because the same has not been shown as either arbitrary or discriminatory or actuated by malice. Therefore, the writ petition is devoid of merits.

In the result, the writ petition is dismissed. In the circumstances of the case, there shall be no order as to costs.

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(K.C. BHANU, J.)

25th January, 2005

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2 The Chief Engineer, Road and Buildings, Erra Manzil, Hyderabad.
3 The Superintending Engineer (R&B) Rural Circle, Bulkampet, Hyderabad.
4 The Commissioner, Commissionerate of Tenders, C-Block 6th Floor B.R.K.R. Hyderabad.
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